

No. 77-1718

Supreme Court, U. S.  
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**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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CITY OF PHILADELPHIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 573 F.2d 802. The order of the district court filed on January 29, 1975 (Pet. App. A30-A32), the order of the district court filed on March 5, 1976 (Pet. App. A25-A29), the memorandum opinion and order of the district court filed on April 15, 1977 (Pet. App. A18-A20), the supplemental opinion and amended order of the district

court filed on April 25, 1977 (Pet. App. A21-A23), and the order of the district court filed on July 14, 1977 (Pet. App. A24) are all unreported.

#### JURISDICTION

The judgment of the court of appeals was entered on February 27, 1978. The petition for a writ of certiorari was filed on May 30, 1978 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### QUESTION PRESENTED

Whether the district court acted within its discretion in entering preliminary injunctions ordering the City of Philadelphia to appoint a minimum of approximately 20 percent women as police officers pending the resolution of a lawsuit in which a *prima facie* showing of discrimination against women had already been made.

#### STATEMENT

1. In 1974, the United States brought this action, alleging that the Philadelphia Police Department had discriminated against women in recruiting, hiring, promotion, transfer, and assignment. At trial, after the United States had presented its case and the court had denied petitioners' motion to dismiss, the parties agreed to an interim order, which the court approved and entered on March 5, 1976 (Pet. App. A25-A29). That order provided that the City would

hire a minimum of 100 women among those hired to fill the 471 vacancies then in existence in the police department, and that the City would conduct a study of the performance of those 100 women (Pet. App. A26-A27). The results of that study, along with any additional evidence, would be submitted to the court, which would then order any further relief that was appropriate. In addition, the order prohibited petitioners from engaging in any act or practice having the purpose or effect of discriminating against women, and it included various specific provisions designed to eliminate discrimination from the department (Pet. App. A27).

The 100 women who were to be appointed immediately were to be selected from an eligibility list based upon an entrance examination given on May 31, 1975. Upon graduation, they were to be assigned to positions as police officers in the same manner as male graduates. The order further specified that the court retained jurisdiction over the matter for all purposes and that issues not addressed in the order would be deferred for two years or until completion of the study, whichever occurred first (Pet. App. A26-A27, A29). In addition to the requirements of the March 5 order, the Philadelphia City Solicitor agreed in a letter of understanding dated February 27, 1976, to provide the United States with at least 60 days' notice before filling any vacancies in addition to the approximately 470 referred to in the order (Pet. App. A5).



2. On April 1, 1977, having complied with the hiring requirements of the March 5 order, petitioners advised the court that they intended to appoint a class of police recruits consisting of 100 men and no women. The United States immediately moved to enjoin this hiring unless at least 20 percent of the recruits were women. The United States alleged that the additional hiring violated Title VII of the Civil Rights Act of 1964, 78 Stat. 241, that it perpetuated the effects of past discriminatory employment practices, and that petitioners had failed to give the United States 60 days' notice as required by the February 27, 1976, letter of understanding (Pet. App. A5-A6).

On April 15, 1977, the district court enjoined petitioners from hiring the all-male police class (Pet. App. A18-A20). The court found it "uncontested" that the police department had had a policy of refusing to hire women as police officers. It observed that the question whether this conduct was justified would not be resolved until all evidence had been presented to the court (Pet. App. A19). Since petitioners were "prima facie in violation of Title VII" and since it appeared that irreparable injury was threatened from any further violation, the court enjoined the appointment of an all-male class to the Police Academy (Pet. App. A19-A20).

An evidentiary hearing was then held at petitioners' request. On April 25, 1977, the court issued a Supplemental Opinion and Amended Order (Pet. App. A21-A23). In its opinion, the court observed that because the City had failed to give the United States

60 days' notice before filling any new vacancies and had instead notified the members of the contemplated Police Academy class of their appointments, more than half of those appointed had resigned from their previous employment (Pet. App. A22). To avoid imposing a hardship on the proposed male appointees, the court therefore amended its order, directing petitioners to appoint 20 women in addition to the 100 men previously notified of their appointment. In entering that order, the court noted that with respect to future appointments, "we were and remain under the impression that the letter and spirit of counsel's agreement as evidenced by the Court's Order contemplated that the proportion of females previously employed would be the standard to be adopted for all future hirings pending final decision of the Court" (Pet. App. A22). Petitioners appealed from the amended order (Pet. App. A9).

On June 7, 1977, petitioners advised the court and parties of their intention to hire an additional 350 police officers. Again, petitioners proposed that all 350 appointees would be males (Pet. App. A9 n. 5). The United States again objected, and on July 14, 1977, the court ordered that the 350 new officers would have to include 20 percent women selected from the eligibility list (Pet. App. A24). Petitioners also appealed from that order. The appeals from the April 25 and July 14 orders of the district court were subsequently consolidated.

3. The court of appeals upheld both orders. It found that the district court acted well within its dis-

cretion in requiring that pending final resolution of the case, petitioners must meet hiring goals similar to those in the consent order of March 5, 1976 (Pet. App. A9).<sup>1</sup>

In light of "the obvious justification for [the district court's] finding of discriminatory \* \* \* practices" (Pet. App. A9), the court of appeals observed that the district court's decree would both further the purposes of Title VII and prevent petitioners from taking action inconsistent with the March 5 order. Preliminary relief was appropriate, the court noted, because the plaintiff was likely to prevail on the merits, and because the district court did not err in presuming that irreparable injury would result if it failed to enter a preliminary injunction. Additionally, the court of appeals observed that the district court had recognized the interests of third parties and the public. The district court had taken steps to avert hardship to males who had left their jobs in anticipa-

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<sup>1</sup> The court of appeals also considered appeals from other rulings of the district court on motions filed by the United States after entry of the March 5, 1976 order. Two appeals by the City concerned applications of incumbent policewomen to transfer from the all-female line of progression (policewoman) to the all-male line of progression (policeman). Another appeal by the United States concerned the district court's failure to find that the City had discriminated against Shirley Terry, a female officer, when it fired her on the basis that her pregnancy rendered her physically incapable of continuing to perform the duties of a police officer. See Pet. App. A3-A4. In this Court, petitioners challenge only those orders of the district court requiring the appointment of women as police officers.

tion of appointment to the department "while preserving for females the same proportionate number of positions in the police department agreed to by the parties in the March 5 order" (Pet. App. A9-A10).

#### ARGUMENT

1. The district court's orders of April 25, 1977, and July 14, 1977, were not stayed, and petitioners subsequently appointed police officers in accordance with the terms of those orders. The district court has entered two further orders respecting hiring of police officers from the eligibility list compiled from the May 31, 1975 examination (Pet. App. A34-A35, A36-A38), but those orders were not at issue before the court of appeals and are not challenged here (see Pet. 13 n. 5). Moreover, the eligibility list compiled from the May 31, 1975 examination is now exhausted, and the City plans to compile a new eligibility list on the basis of a new qualifying examination (Pet. App. A37-A38). Accordingly, it appears that the challenge to the April 25 and July 14 orders is moot, and that in light of the City's plan to compile a new eligibility list on the basis of a new examination, the interim relief granted by the district court does not present a controversy that is capable of repetition yet evading review.<sup>2</sup>

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<sup>2</sup> There is, for example, no reason to assume that the new list will duplicate the old in either gender distribution or the effects caused by the awarding of veterans' preference points. Nor do petitioners indicate any desire to adjust appointment dates of the officers appointed from the exhausted list.



Because we believe that this case would not otherwise warrant plenary review by this Court, we submit that the petition for a writ of certiorari should be denied. While there may no longer be a live controversy on the merits of this case, this Court plainly has jurisdiction to rule on the certiorari petition, and for the reasons more fully set forth in our brief in opposition in *Velsicol Chemical Corp. v. United States*, No. 77-900, certiorari denied March 27, 1978, the petition should be denied if the Court would have denied the petition had there continued to be a live controversy in this case.<sup>3</sup>

2. On the merits, petitioners contend that the district court's April 25 and July 14 orders were improper because the all-male groups that were selected for appointment prior to those orders were selected on a nondiscriminatory basis. Petitioners' all-male selections were made on the basis of the May 31, 1975 examination, which was taken by 8,299 men and 2,252 women. The men and women passed the examination at approximately the same rate, but the final eligibility list was skewed in favor of men (Pet. 11, 13). Petitioners state that the reason that men are disproportionately represented among the high scorers on the eligibility list is that many men enjoy veterans' preference credits, which add significantly to their total scores. Accordingly, after the initial 100 women were appointed pursuant to the March 5

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<sup>3</sup> We are providing a copy of our opposition in *Velsicol Chemical Corp.* to counsel for petitioners.

order, those with the highest remaining scores were men, and proceeding strictly by rank on the eligibility list, petitioners selected two successive all-male groups.

While petitioners characterize their subsequent appointments as divorced from the underlying litigation, these appointments are in fact subject to the supervision of the court and the terms of the March 5 consent order. The pending litigation was suspended—at petitioners' request—so that petitioners could study the performance of women appointed as police officers under the March 5 order. The district court's subsequent orders simply enforced "the letter and [the] spirit of counsels' agreement" (Pet. App. A22) and ensured that the status quo established by the March 5 order would be maintained pending the resolution of the case.

Contrary to petitioners' suggestion, there has been no finding that the selection process for the eligibility list, including the veterans' preference provisions and the written examination, is free from gender-based discrimination. By the terms of the March 5 consent order, resolution of the merits of the discrimination action was deferred pending completion of petitioners' study. Accordingly, the court's orders did not contravene a valid, nondiscriminating selection system, but merely provided relief *pendente lite* so that opportunities for women applicants would not be foreclosed throughout the period that petitioners were

preparing their defense on the merits of the discrimination claim.<sup>4</sup>

3. The court of appeals correctly held that the district court acted well within its discretion in granting preliminary injunctive relief. First, as both the district court and the court of appeals held, the plaintiffs are highly likely to prevail on the merits of the underlying lawsuit. Petitioners have admitted that they followed a policy of refusing to hire women as police officers but have sought to defend the suit on the ground that sex is a *bona fide* occupational qualification for becoming a police officer. In *Dothard v. Rawlinson*, 433 U.S. 321, however, this Court held that it is impermissible under Title VII to refuse to hire an individual man or woman on the basis of stereotyped characterizations of the sexes. In light of that decision and the overall strength of the plaintiffs' case, the court of appeals correctly characterized

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<sup>4</sup> Citing this Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, petitioners contend that the relief in this case was improper since it did not serve "to place victims of discrimination in their rightful place" (Pet. 17). In fact, however, the district court was not granting final retroactive relief to individuals, but was seeking to devise a form of prospective interim relief that would best protect the interests of both women applicants and the class of innocent third parties—the male police candidates. By maintaining the *status quo* pending the resolution of the case, the district court minimized the disruption to the class of male applicants while at the same time maintaining the level of opportunity for women applicants at approximately the level the parties had agreed was appropriate in the March 5 consent order.

petitioners' proposed defense as "dubious" (Pet. App. A10).

Second, without some form of interim relief, those on whose behalf the United States brought suit could suffer irreparable injury. If petitioners are permitted to fill all available police officer vacancies with men, women will be denied job opportunities to which it appears that they are properly entitled. The loss of opportunity constitutes irreparable injury in two senses: the jobs that are filled are irreversibly lost to women applicants, and the loss of opportunity during the extended period of the litigation permanently disadvantages even those women who may ultimately be hired following the lawsuit, in ways that are difficult to overcome by decree.

Third, the district court's orders took proper account of the public interest and the possibility of harm to other interested persons. The orders furthered the public policy of ensuring equality of employment opportunity, for women, while at the same time avoiding hardship to the men who had already left their previous jobs. Moreover, the orders permitted the City to hire the additional police officers it needed, while providing women with the proportionate number of positions agreed to by the parties in the March 5 order. Thus the trial court, in keeping with this Court's admonition in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 375, "look[ed] to the practical realities and necessities inescapably involved in reconciling competing interests,' in order to determine the



'special blend of what is necessary, what is fair, and what is workable.' "

The district court thus satisfied each of the formal prerequisites for granting preliminary injunctive relief, and it acted well within its discretion in entering the two orders challenged here.

### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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